

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

MONTRAE AYERS,

Defendant and Appellant.

B165908

(Los Angeles County
Super. Ct. No. GA050794)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Joseph F. DeVanon, Judge. Affirmed in part, reversed in part and remanded.

Jill Lansing, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria Wilson and Michael W. Whitaker, Deputy Attorneys General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts 1 and 2 of the Discussion.

Montrae Ayers appeals the judgment entered following his conviction after a jury trial for a gang-related attempted murder, attempted robbery and several other related offenses. On appeal Ayers argues he was denied the effective assistance of counsel during trial. He also contends the trial court committed sentencing error. We return the matter to the trial court to impose corrected sentences for the premeditated attempted murder and attempted robbery convictions and otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Ayers and Shane Plaid are fellow gang members. Ayers went to Matthew Henson's home and demanded money after Henson had identified Plaid to police as a drive-by shooting suspect. Henson refused the demand. Ayers later returned to Henson's home and repeated his demand for money. Henson again refused. Ayers shot Henson twice in the head.

A jury convicted Ayers of attempted willful, deliberate and premeditated murder (count 1), assault with a firearm (count 2), attempted home invasion robbery (count 3), possession of a firearm by a felon (count 4) and threatening a witness (count 5).

The jury found as to counts 1 and 3 that Ayers personally and intentionally discharged a firearm, which proximately caused great bodily injury; as to counts 1, 2, 3 and 5 that Ayers committed the offenses for the benefit of a criminal street gang; and as to count 2 that Ayers personally inflicted great bodily injury and personally used a firearm. The jury also found that Ayers had suffered a prior serious felony conviction, making him eligible for sentencing under the "Three Strikes" law, and that he had served a separate prison term for a felony.

Ayers was sentenced to an aggregate term in state prison of 62 years four months to life. On count 1, attempted premeditated murder, Ayers was sentenced to a total of 59 years to life: 14 years to life for the base term (double the seven-year minimum term of confinement before eligibility for parole prescribed by Penal Code section 3046, subdivision (a)(2)), plus 15 years for the gang enhancement, plus 25 years to life for the firearm use/great bodily injury enhancement, plus five years for his prior serious felony

conviction. On each of counts 3 and 4 (attempted robbery and felon in possession of a firearm), he received a consecutive term of eight months (one-third of one-half the middle term on count 3 and one-third the middle term on count 4). On count 5 (threatening a witness), Ayers was sentenced to a further consecutive term of two years (one-third the middle term of three years for the substantive offense, plus one-third the middle term of three years for the street gang enhancement). His sentence of four years plus applicable enhancements on count 2 (assault with a firearm) was stayed pursuant to Penal Code section 654.

DISCUSSION

1. This Record Fails to Establish Ineffective Assistance of Counsel

Because the People charged that Ayers's crimes were committed for the benefit of a criminal street gang, the People presented the testimony of two expert witnesses concerning the street gang to which both Ayers and Plaid belonged. Ayers asserts that evidence of his gang membership, without a proper limiting instruction, created an unacceptable risk the jury would improperly infer he had a criminal disposition and was for that reason necessarily guilty of the offenses charged. Ayers contends his trial counsel's failure to request a limiting instruction constituted ineffective assistance of counsel that violated his right to due process and requires reversal of his conviction.

"A claim of ineffective assistance of counsel is evaluated by well-established standards. A defendant seeking relief on the basis of ineffective assistance must show both that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings. [Citations.]" (*People v. Cudjo* (1993) 6 Cal.4th 585, 615.)

There is a presumption the challenged action "might be considered sound trial strategy" under the circumstances. (*Strickland v. Washington* (1984) 466 U.S. 668, 689 [104 S.Ct. 2052, 80 L.Ed.2d 674]; accord, *People v. Dennis* (1998) 17 Cal.4th 468, 541.) On a direct appeal a conviction will be reversed for ineffective assistance of counsel only

where the record demonstrates there could have been no rational tactical purpose for counsel's challenged act or omission. (*People v. Lucas* (1995) 12 Cal.4th 415, 442; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1058 [“[i]f the record sheds no light on why counsel acted or failed to act in the manner challenged, “unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,” [citation], the contention [that counsel provided ineffective assistance] must be rejected.”].)

Ayers's claim that there is no conceivable tactical reason for his counsel's failure to request a limiting instruction is unfounded. It is at least possible defense counsel concluded any such instruction would have been more damaging than helpful, leading the jury to focus on the gang evidence rather than merely regarding it as one of a number of background factors about which they heard evidence. “Additional facts, irrelevant to the issues at the trial and possibly prejudicial to appellant may very well have justified . . . counsel's decision” (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.) Because the record sheds no light on the reason for defense counsel's actions, a claim of ineffective assistance is more appropriately decided in a habeas corpus proceeding where all relevant facts can be developed. (*Ibid.*; *People v. Avena* (1996) 13 Cal.4th 394, 419 [“Where the record does not illuminate the basis for the challenged acts or omissions, a claim of ineffective assistance is more appropriately made in a petition for habeas corpus.” [Citations.]]).)

2. *Ayers Was Improperly Sentenced on Count 1*

Ayers contends the trial court improperly calculated the principal term of his sentence (count 1 for attempted premeditated murder) by impermissibly adding a separate 15-year street gang enhancement to the base term of 14 years to life (the seven-year minimum term of confinement before eligibility for parole prescribed by Penal Code section 3046, subdivision (a)(2), doubled pursuant to the Three Strikes law).¹ In his

¹ Ayers does not challenge the additional specific enhancement for count 1 of 25 years to life for his personal use of a firearm causing great bodily injury (Pen. Code,

opening brief Ayers argued that, pursuant to Penal Code section 186.22, subdivision (b)(5),² the trial court should have imposed a minimum parole eligibility date of 15 years for the life sentence imposed on the attempted premeditated murder count with no additional term as a gang enhancement. The People agree the trial court miscalculated the base term, but differ as to the proper result, asserting that, under *People v. Jefferson* (1999) 21 Cal.4th 86, 101 (*Jefferson*), Ayers should have been sentenced to 15 years to life, doubled to 30 years to life under the Three Strikes law, plus the additional firearm use and prior felony conviction enhancements. We agree with the People.³

The punishment for attempted premeditated murder is “imprisonment in the state prison for life with the possibility of parole.” (Pen. Code, § 664, subd. (a)(1).) The minimum period of confinement before eligibility for parole is the greater of “[a] term of at least seven calendar years” or “[a] term as established pursuant to any other provision of law that establishes a minimum term or minimum period of confinement under a life sentence before eligibility for parole.” (Pen. Code, § 3046, subd. (a)(2); see *Jefferson*, *supra*, 21 Cal.4th at p. 96 [minimum term for attempted premeditated murder is prescribed by section 3046].) Penal Code section 186.22, subdivision (b)(5) specifies a minimum period of confinement greater than seven years for attempted premeditated

§ 12022.53, subd. (d)) or the status enhancement of five years for his prior serious felony conviction (Pen. Code, § 667, subd. (a)(1)).

² Penal Code section 186.22, subdivision (b), prescribes additional punishment for individuals convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang with the specific intent to promote, further or assist in any criminal conduct by gang members. Subdivision (b)(5) provides: “[A]ny person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life, shall not be paroled until a minimum of 15 calendar years have been served.”

³ In his reply brief Ayers concedes the People are correct and acknowledges our obligation under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 to apply the holding of *Jefferson*, *supra*, 21 Cal.4th 86 in this case.

murder committed for the benefit of a criminal street gang and therefore applies in this case. (*Jefferson, supra*, 21 Cal.4th at p. 100.)

Although “enhancements” are not subject to doubling under the Three Strikes law, the 15-year minimum term imposed under Penal Code section 186.22, subdivision (b)(5), is not an enhancement, but an “*alternate* penalty for the underlying felony itself.” (*Jefferson, supra*, 21 Cal.4th at p. 101.) As such, the 15-year minimum term was “subject to sentence-doubling”; and the trial court here, like the trial court in *Jefferson*, “erred in not doubling [the] defendant’s 15-year minimum term.” (*Ibid.*)

3. *Ayers Must Be Resentenced on Count 3*

We requested supplemental briefing from the parties to address whether the trial court erred in computing the subordinate term on count 3 (attempted robbery) as simply one-third of one-half of the middle term of four years, or eight months, in light of the fact the People had pleaded and proved Ayers was a second strike offender -- an issue not raised in either the trial court or the parties’ appellate briefs. Both Ayers and the People agree that under the Three Strikes law the subordinate term for qualifying offenses for a two-strikes defendant should be *double* one-third of the middle term (Pen. Code, §§ 667, subd. (e)(a); 1170.12, subd. (c)(1); *People v. Nguyen* (1999) 21 Cal.4th 197, 207), which in this case results in a term of 16 months on count 3. Ayers and the People disagree, however, as to whether the eight-month term imposed on count 3 is an “unauthorized sentence” that may be identified and corrected on appeal even though there was no objection in the trial court. (*People v. Smith* (2001) 24 Cal.4th 849, 854.)

“[A] sentence is generally ‘unauthorized’ where it could not lawfully be imposed under any circumstances in the particular case.” (*People v. Scott* (1994) 9 Cal.4th 331, 354.) In such circumstances “[a]ppellate courts are willing to intervene in the first instance because such error is ‘clear and correctable’ independent of any factual issues presented by the record of sentencing. [Citation.]” (*Ibid.*) A trial court’s failure to properly make a discretionary sentencing choice, on the other hand, does not result in an unauthorized sentence. (Compare *People v. Smith, supra*, 24 Cal.4th at pp. 852-854, with

People v. Tillman (2000) 22 Cal.4th 300, 303; see *People v. Scott, supra*, 9 Cal.4th at p. 354.)

Ayers insists the trial court's failure to double the subordinate term imposed on count 3 represents a discretionary sentencing choice that, in light of the People's failure to object in the trial court, is not properly before us as part of his direct appeal. (*People v. Scott, supra*, 9 Cal.4th at p. 354; *People v. Tillman, supra*, 22 Cal.4th at p. 303.) In support of his argument, Ayers emphasizes that the trial court has discretion to dismiss allegations the defendant has suffered a prior strike "in furtherance of justice" based on an individualized evaluation of the nature and circumstances of the defendant's present felonies and prior serious and/or violent felony convictions and the particulars of his or her background, character and prospects. (Pen. Code, § 1385, subd. (a); *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530; *People v. Williams* (1998) 17 Cal.4th 148, 161.) That power, moreover, may be exercised by the trial court to dismiss prior strike allegations as to some, but not all, counts. (*People v. Garcia* (1999) 20 Cal.4th 490, 496.) Finally, Ayers contends that, although the trial court failed to set forth in the clerk's minutes any reasons for dismissing the prior strike allegations as to count 3, as required by Penal Code section 1385, subdivision (a), on a silent record this court must presume the trial court made the requisite factual findings. (*People v. Burnett* (2004) 116 Cal.App.4th 257, 261 [failure to impose sex offender fine pursuant to Pen. Code, § 290.3 is not an unauthorized sentence subject to correction on appeal absent an objection by the People in the trial court].)

Ayers's position would appear correct if the trial court had stated it was dismissing the prior strike allegation as to count 3 and then failed to set forth its reasons for doing so as required by Penal Code section 1385, subdivision (a). But here the trial court neither exercised its discretion to dismiss the prior strike allegation nor sentenced Ayers in accordance with the mandate of the Three Strikes law. The court was jurisdictionally obligated to do one or the other. (*People v. Bradley* (1998) 64 Cal.App.4th 386, 390-391 ["The trial court had a duty to impose sentence in accord with the law. [Citations.] The

failure to impose or strike an enhancement is a legally unauthorized sentence subject to correction for the first time on appeal”]; *People v. Morales* (2003) 106 Cal.App.4th 445, 454-455 [“A failure to double subordinate terms when a prior violent or serious felony conviction allegation has been found to be true is a jurisdictional error which can be raised for the first time on appeal”].) Accordingly, the sentence imposed on count 3 is “unauthorized.”

As Ayers notes, the trial court has jurisdiction in a multiple count case to strike a prior serious felony conviction finding as to individual counts. The trial court in this case appears not to have recognized the applicability of the Three Strikes law to count 3 and never had occasion to exercise its discretion to dismiss the prior strike allegation as to that count. We therefore remand the cause to the trial court to exercise its discretion under Penal Code section 1385, subdivision (a), in the first instance as to count 3.

DISPOSITION

The judgment is reversed with respect to the sentence imposed on the attempted premeditated murder count (count 1) and the attempted robbery count (count 3), and the matter is remanded for resentencing on those counts in accordance with the views expressed in this opinion. In all other respects, the judgment is affirmed.

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PERLUSS, P. J.

We concur:

JOHNSON, J.

ZELON, J.